action (that given by the Code of Civil Procedure) in cases where the death of an employee had been negligently caused;" that is, in cases where the right existed before section 1970 was amended. It would seem that the court might have gone further and found language which explicitly negatives the existence of such a design, for the application of the amendment is by its terms expressly limited to cases in which "death results from an injury to an employee received as aforesaid." This phrase "received as aforesaid" seems to indicate that the legislature was simply providing a remedy in those causes of action which it had just created in the first part of the enactment.

C. A. R.

TORTS: SPITE FENCE.—There is much divergence of judicial opinion as to the liability of the owner of land for using it, not for any benefit to himself, but purely to the detriment of his neighbor. Some states hold that an owner may erect on his land, near the boundary, an abnormally high fence, not for any advantage of his own, but merely to darken his neighbors' windows or to obstruct the view.[1] The courts which deny compensation for the damage inflicted by spite fences proceed upon the assumption that the owner of land, by virtue of his ownership, has an absolute right to erect such a fence. As Ames points out,[2] "If, in truth, the owner's right is absolute in this respect, how can it be taken away from him by statute?

The immunity from liability for maintaining spite fences probably exists in England. "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."[3] On the other hand in France and Germany the owner is liable in tort.[4]

In the United States an opinion by Mr. Justice Morse[5] marks the beginning of the trend of authority away from the traditional view and holds that if an owner makes such an obstruction as a fence with the intention of injuring his neighbor, and without any advantage or benefit to himself, it is a nuisance for which his neighbor has a right of action. While Justice Morse's opinion was not concurred in by a majority of the court it has been followed since in Michigan.[6] A number of jurisdictions now hold that an adjoining landowner may sue for damages caused by, or may enjoin the erection or maintenance of a spite fence erected for the

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[1] Russell v. State (1904), 32 Ind. App. 243, 69 N. E. 482; Bordeau v. Greene (1899), 22 Mont. 254, 56 Pac. 218; Brostrom v. Lauppe (1901), 179 Mass. 315, 60 N. E. 785; Mahan v. Brown (1835), 13 Wend. 261.

[2] Tort Because of Wrongful Motive, 18 Harvard Law Review, 411, 415, n.

[3] Mayor v. Pickles [1895] App. Cas. 587.

[4] 18 Harvard Law Review, 414.

[5] Burke v. Smith (1888), 69 Mich. 380, 37 N. W. 838.

[6] Peck v. Roe (1896), 110 Mich. 52, 67 N. W. 1080; Flaherty v. Moran (1890), 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183.

sole purpose of injuring him in the lawful and beneficial use of his property.[7]

An Oklahoma case, *Hibbard v. Halliday*,[8] accords with this modern view. The court says that property in land must be considered for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges. The right to use one's own property for the sole purpose of maliciously injuring another is not one of the immediate and indestructible rights of ownership.

In California the matter is regulated by statute. An Act of 1885 prohibited the erection of any fence or partition wall exceeding ten feet in height, without a permit from the board of supervisors or city council of the city or town, and also provided that the consent of the adjoining owner should be obtained before such permit is granted.[9] No mention is made of malice, but in 1913 an Act was passed remedying this defect. This provided that "Any fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupants of adjoining property, shall be deemed a private nuisance.[10]

Similar statutes have been enacted in various jurisdictions,[11] and such statutes have been held to be within the limits of the police power[12] and constitutional.[13] In order to bring an obnoxious fence within the provisions of such a statute, and to avoid constitutional objections, the malicious intent must be so predominate as to give character to the fence, and it must be manifest that its real usefulness will be clearly subordinate and incidental.[14]

F. H. W.

TORTS: VENDOR'S LIABILITY TO SUB-VENDEE: PROXIMATE CAUSE.—An oil company sold cans of mixed kerosene and gasoline to a grocer. Should the oil company be liable to one who purchased the mixture from the grocer and was injured by the explo-

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[7] Barger v. Barringer (1909), 151 N. C. 433, 435; 66 S. E. 439, 25 L. R. A. (N. S.) 831, n., 19 Ann. Cas. 472, n.; Norton v. Randolph (1912), 176 Ala. 381, 58 So. 283, Ann. Cas. 1915-A, 714, 40 L. R. A. (N. S.) 129; Kirkwood v. Finegan (1893), 95 Mich. 543, 55 N. W. 457; Smith v. Speed (1901), 11 Okl. 95, 66 Pac. 511; Haverstick v. Sipe (1859), 33 Pa. St. 368.

[8] (Oklahoma, June 13, 1916), 158 Pac. 1158.

[9] Held constitutional in Western Granite & Marble Co. v. Knickerbocker (1894), 103 Cal. 111, 37 Pac. 192.

[10] Cal. Stats. 1913, p. 342.

[11] Ky., Me., Mass., N. H., Vt., and Wash.

[12] Horan v. Burnes (1903), 72 N. H. 93, 54 Atl. 945, 101 Am. St. Rep. 670, 62 L. R. A. 602.

[13] Rideout v. Knox (1889), 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep.. 560, 2 L. R. A. 81. Such a statute was held unconstitutional in Huber v. Merkel (1903), 117 Wis. 355, 94 N. W. 354; Karasek v. Peier (1900), 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

[14] Supra, n. 13.